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Wm Penn
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Thomas Parke

THE

ENGLISHMAN'S RIGHT:

A

DIALOGUE.

As Jurymen are liable to doubts in the discharge of their duty, this Treatiſe is earneſtly recommended, as giving them full inſtruction in every part of it.

THE

Engliſhman's Right:

A

DIALOGUE

BETWEEN A

BARRISTER at LAW

AND A

JURYMAN;

Plainly ſetting forth,

I. The ANTIQUITY,
II. The Excellent Deſigned USE,
III. The OFFICE, and Juſt PRIVILEGES, of JURIES,

By the Law of England.

By Sir *JOHN HAWLES*, Knight,
SOLICITOR-GENERAL to the late King WILLIAM.

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RPTOR

PREFACE.

AS the ſecurity of our perſons, our reputations, our properties, and our liberties, depends upon Jurors; it can never be unſeaſonable to inform, or to remind them of their *duties*. While they remain ignorant of the nature of their ſtation, they cannot determine with propriety; while they feel not its importance, they will not conduct themſelves with ſpirit. When queſtions, however, which relate to the welfare of the PEOPLE, are agitated in courts of juſtice; inſtructions of this kind become of more than ordinary importance. Errors upon theſe occaſions may be attended with fatal conſequences; ſince powers will be introduced, which may, in the end, overturn the conſtitution.

But it is not upon the good intentions of Jurymen only, that we muſt depend. If they ſhould be prevented, either by fraud or by force, from diſcharging the truſt repoſed in them; their endeavours will avail little to the protection of the ſubject. Their *rights* ought, therefore,

therefore, to be guarded againſt all attacks; eſpecially as men of great eminence in the law have publickly declared that they have lately been invaded: — and, to be defended, they muſt be underſtood.

A knowledge, then, of whatever relates to the office of Juries, ſeems at this time eſſentially neceſſary; ſince from hence alone can ariſe the proper *execution* of it's *duties*, and the *preſervation* of it's *rights*.—To promote this end, the following pamphlet is now republiſhed. It's character for perſpicuity, and ſtrength of reaſoning, is ſo well eſtabliſhed, that it is needleſs to enlarge upon it here. If it meets with the ſucceſs which it's merit deſerves, it will, perhaps, be a principal means of preſerving the trial by Jury, in it's full force, to poſterity.

ADVERTISEMENT to the READER.

THIS treatiſe has paſſed through many editions. It appeared firſt in the year 1680; it was reprinted in the year 1731, and again in 1752, 1763, 1764, 1770, and 1771; and is now preſented to the public at leaſt for the *eighth* time.

N. B. Many circumſtances might lead the reader to ſuſpect, that this Dialogue has been altered in order to accommodate to the preſent times. This edition, however, has been carefully collated with the *firſt*, which was printed in London, for Richard Janeway, in Queen's Head Alley, Pater-noſter-Row, in the year 1680. So ſcrupulouſly has the Original been adhered to, that not a ſingle word has been altered; except in the tranſlation of the Latin ſentences in page 3, the latter of which was before unintelligible. Liberties, indeed, have been taken with the orthography, and pointing; but theſe have not in the leaſt affected the ſenſe.

THE

ENGLISHMAN's RIGHT,

&c. &c. &c.

Barriſter.

MY old Client! a good morning to you: whither ſo faſt? you ſeem intent upon ſome important affair.

Juryman. Worthy Sir! I am glad to ſee you thus opportunely, there being ſcarce any perſon that I could at this time rather have wiſhed to meet with.

Barr. I ſhall eſteem myſelf happy, if in any thing I can ſerve you.—The buſineſs, I pray?

Jurym. I am ſummoned to appear upon a Jury, and was juſt going to try if I could get off. Now I doubt not but you can put me into the beſt way to obtain that favour.

Barr. It is probable I could: but firſt let me know the reaſons why you deſire to decline that ſervice.

Jurym. You know, Sir, there is ſomething of trouble and loſs of time in it:—and men's lives, liberties, and eſtates (which depend upon a jury's *guilty*, or *not guilty*, for the plaintiff, or for the defendant) are weighty things. I would not wrong my conſcience for a world, nor be acceſſory to any man's ruin. There are others better ſkilled in ſuch matters. I have ever

ſo loved peace, that I have forborne going to law (as you well know) many times, though it hath been much to my loſs.

Barr. I commend your tenderneſs and modeſty; yet muſt tell you, theſe are but general and weak excuſes.

As for your *time* and *trouble*, it is not much; and however, can it be better ſpent than in doing juſtice, and ſerving your country? To withdraw yourſelf in ſuch caſes, is a kind of ſacrilege, a robbing of the public of thoſe duties which you juſtly owe it. The more *peaceable* man you have been, the more fit you are: for the office of a Juryman is, conſcientiouſly to judge his neighbour; and needs no more *law* than is eaſily learnt to direct him therein. I look upon you therefore as a man well qualified with eſtate, diſcretion, and integrity; and if all ſuch as you ſhould uſe private means to avoid it, how would the king and country be honeſtly ſerved? At that rate we ſhould have none but fools or knaves entruſted in this grand concern, on which (as you well obſerve) the lives, liberties, and eſtates of all *England* depend.

Your *tenderneſs not to be acceſſory* to any man's being wronged or ruined, is (as I ſaid) much to be commended. But may you not incur it unawares, by ſeeking thus to avoid it? *Pilate* was not innocent becauſe he waſhed his hands, and ſaid, 'He would have 'nothing to do with the blood of that juſt one.' There are faults of omiſſion as well as commiſſion. When you are legally called to try ſuch a cauſe, if you ſhall ſhuffle out yourſelf, and thereby perſons perhaps leſs conſcientious happen to be made uſe of, and ſo a villain eſcapes juſtice, or an innocent man is ruined, by a prepoſſeſſed or negligent verdict; can you think yourſelf in ſuch

a caſe

a caſe wholly blameleſs? *Qui non prohibet cum poteſt, jubet:* That man abets an evil, who prevents it not, when it is in his power. *Nec caret ſcrupulo ſocietatis occultæ, qui evidenter facinori deſinit obviare:* Nor can he eſcape the ſuſpicion of being a ſecret accomplice, who evidently declines the prevention of an atrocious crime.

Jurym. Truly, I think a man is *bound* to do all the good he can; eſpecially when he is lawfully called to it. But there ſometimes happen nice caſes, wherein it may be difficult to diſcharge one's conſcience without incurring the diſpleaſure of the court, and thence trouble and damage may ariſe.

Barr. That is but a vain and needleſs fear. For as the jurors privileges (and every *Engliſhman*'s in and by them) are very conſiderable; ſo the laws have no leſs providently guarded them againſt invaſion or uſurpation. So that there needs no more than, firſt, underſtanding to know your duty; and, in the next place, courage and reſolution to practiſe it with impartiality and integrity, free from accurſed bribery and malice, or (what is full as bad in the end) baſe and ſervile fear.

Jurym. I am ſatisfied, that as it is for the advantage and honour of the *public*, that men of underſtanding, ſubſtance and honeſty, ſhould be employed to ſerve on juries, that *juſtice* and *right* may fairly be adminiſtered; ſo it is their *own intereſt*, when called thereunto, readily to beſtow their attendance and ſervice, to prevent *ill precedents* from men otherwiſe qualified; which may by degrees fatally, though inſenſibly, undermine our juſt birth-rights, and perhaps fall heavy one day upon us, or our poſterity.

But, for my own part, I am fearful leſt I ſhould ſuffer through my ignorance of the duty and office of a juryman; and, therefore, on that account principally it is, that I deſire to be excuſed in my appearance; which if I underſtood but ſo well as I hope many others do, I would with all my heart attend the ſervice.

Barr. You ſpeak honeſtly, and like an *Engliſhman*. But if that be all your cauſe of ſcruple, it may ſoon be removed, if you will but give yourſelf a very little trouble of enquiry into the neceſſary proviſions of the law of *England* relating to this matter.

Jurym. There is nothing (of a temporal concern) that I would more gladly be informed in; becauſe I am ſatisfied, it is very expedient to be generally known. And firſt, I would learn *how long* trials by juries have been uſed in this nation *.

Barr. Even time out of mind;—ſo long, that our beſt hiſtorians cannot date the original of the inſtitution; being indeed cotemporary with the nation itſelf, or in uſe as ſoon as the people were reduced to any form of civil government, and adminiſtration of juſtice. Nor have the ſeveral conqueſts or revolutions, the mixtures of foreigners, or the mutual feuds of the natives, at any time, been able to ſuppreſs or overthrow it. For,

1. That

* Our author, in his title-page, told us, that he intended to point out, with reſpect to Juries, 1. their *antiquity*; 2. their *excellent deſigned uſe*; 3. their *office* and *juſt privileges*. In anſwer to the Juryman's queſtion, and in compliance with his own promiſe, he is now going to treat of the *antiquity* of Juries.

1. That juries (the thing in effect and ſubſtance, tho' perhaps not juſt the number of twelve men) were in uſe among the *Britons*, (the firſt inhabitants of this iſland) appears by the ancient monuments and writings of that nation; atteſting that their Freeholders had always a ſhare in all trials and determinations of differences.

2. Moſt certain it is, that they were practiſed by the *Saxons* *, and were then the only courts, or at leaſt an eſſential, and the greater part of all courts of judicature: for ſo (to omit a multitude of other inſtances) we find in king *Ethelred*'s Laws, 'In *ſingulis Centuriis, &c.*' 'In every hundred let there be 'a court, and let twelve ancient freemen, together 'with the Lord, (or rather, according to the *Saxon*, 'the Greve, i. e. the chief officer amongſt them) 'be ſworn, that they will not condemn any perſon 'that is innocent, nor acquit any one that is guilty.'

3. When the *Normans* came in, *William*, tho' commonly called the *Conqueror*, was ſo far from abrogating this privilege of Juries †, that in the fourth year his of reign, he confirmed all king *Edward* the Confeſſor's laws, and the ancient cuſtoms of the kingdom, whereof this was an eſſential and moſt material part. Nay, he made uſe of a Jury choſen in every county, to report and certify on their oaths what thoſe laws and cuſtoms were; as appears in the proem of ſuch his confirmation.

4. Afterwards when the *Great Charter*, commonly called *Magna Charta*, (which is nothing elſe than a

* *Lamb. p.* 218. *Coke*, 1 *part*, Inſtitutes, *fol.* 155.
† See *Spelman*'s Gloſſar. in the word *Jurata.*

 recital,

recital, confirmation, and corroboration of our ancient *Engliſh* liberties) was made and put under the great ſeal of *England*, in the ninth year of king *Henry* the Third, (which was *anno Domini* 1225) then was this privilege of trials by Juries in an eſpecial manner confirmed and eſtabliſhed; as in the fourteenth chapter, 'That no amercements ſhall be aſſeſſed, 'but by the oath of good and honeſt men of the 'vicinage.' And more fully in that golden nine-and twentieth chapter——'No freeman ſhall be 'taken or impriſoned, nor be diſſeiſed of his freehold 'or liberties, or free cuſtoms, or be out-lawed, or 'exiled, or any other way deſtroyed, nor ſhall we 'paſs upon him, or condemn him, but by the law-'ful judgment of his peers,' *&c.* Which Grand Charter having been confirmed by above thirty acts of parliament, the ſaid right of Juries thereby, and by conſtant uſage, and common cuſtom of *England*, which is the common law, is brought down to us as our undoubted birth-right, and the beſt inheritance of every *Engliſhman.* For as that famous lawyer, chief juſtice *Coke**, in the words of *Cicero*, excellently avers, '*Major hæreditas venit unicuique noſtrum* '*a jure & legibus, quam a parentibus.*' 'It is a greater 'inheritance, and more to be valued, which we de-'rive from the fundamental conſtitution and laws of 'our country, than that which comes to us from 'our reſpective parents:' for without the former, we have no claim to the latter.

Jurym. But has this method of trial never been attempted to be invaded or juſtled out of practice?

Barr.

* 2 Inſtitut. *fol.* 56.

Barr. It is but rarely that any have arrived to ſo great a confidence: 'For it is a moſt dangerous thing 'to ſhake, or alter, any of the rules, or fundamen-'tal points of the common law, which in truth are 'the main pillars, and ſupporters of the fabric of 'the commonwealth:' theſe are judge *Coke*'s words *. Yet ſometimes it has been endeavoured: but ſo ſacred and valuable was the inſtitution in the eyes of our anceſtors, and ſo tenacious were they of their privileges, and zealous to maintain, and preſerve ſuch a *vital part* of their birth-right and freedom; that no ſuch attempts could ever prove effectual, but always ended with the ſhame and ſevere puniſhment of the raſh undertakers. For example,

1. *Andrew Horn*, an eminent lawyer, in his book, entitled, *The Mirror of Juſtices*, (written in the reign of king *Edward* I. now near 400 years ago) in the fifth chapter, and firſt ſection, records, That the renowned *Saxon* king *Alfred* cauſed four-and-forty juſtices to be hanged in one year, as murtherers, for their falſe judgments. And there recites their particular crimes, moſt of them being in one kind or other infringements, violations, and encroachments of and upon the rights and privileges of Juries. Amongſt the reſt, that worthy author tells us, he *hanged one juſtice* Cadwine, *becauſe he judged one* Hackwy *to death without the conſent of all the Jurors; for whereas he ſtood upon his Jury of twelve men, becauſe three of them would have ſaved him, this* Cadwine *removed thoſe three, and put others in their room on the Jury, againſt the ſaid* Hackwy's *conſent*. Where we may obſerve, that though at laſt twelve men did give a verdict againſt

* 2 Inſtitut. *p.* 74.

him,

him, yet thoſe, ſo put upon him, were not accounted his Jurors; by reaſon all, or any of them, who were firſt ſworn to try him, could not (by law) be removed, and others put in their ſtead: And that ſuch illegal alteration was then adjudged a capital crime, and forthwith the ſaid *Cadwine* was hanged.

2. A ſecond inſtance I ſhall give you in the words of the lord chief juſtice *Coke* *: 'Againſt this ancient 'and fundamental law (and in the face thereof) there 'was in the eleventh year of king *Henry* VII. *cap.* 3. 'an act of Parliament obtained (on fair pretences, and 'a ſpecious preamble, as to avoid divers miſchiefs, *&c.*) 'whereby it was ordained, "That from thenceforth, "as well juſtices of aſſize, as juſtices of the peace, "upon a bare information for the king before them "made, without any finding or preſentment by the "verdict of twelve men, ſhould have full power and "authority, by their diſcretions, to hear and deter"mine all offences and contempts committed or done "by any perſon or perſons againſt the form, ordi"nance, or effect of any ſtatute made and not repeal"ed, *&c.*" 'By colour of which act' (ſaith *Coke*) 'ſhaking this fundamental law' (he means, touching all trials to be by Juries) 'it is not credible what 'HORRIBLE OPPRESSIONS and EXACTI'ONS, to the undoing of MULTITUDES of peo'ple, were committed by Sir *Richard Empſon* knight, 'and *Edmund Dudley* Eſq. (being juſtices of the 'peace) throughout *England*; and upon this unjuſt 'and injurious act (as commonly in like caſes it 'falleth out) a new office was erected, and they 'made maſters of the king's forfeitures.'

But

* *Coke*, 2 *part* of Inſt. *fol.* 51.

But not only this ſtatute was juſtly, ſoon after the deceaſe of *Henry* VII. repealed by the ſtat. of the 1 *Hen.* VIII. *cap.* 6. but alſo the ſaid *Empſon* and *Dudley* (notwithſtanding they had ſuch an act to back them, yet it being againſt *Magna Charta*, and conſequently void) were fairly executed for their pains; and ſeveral of their under-agents, as promoters, informers, and the like, ſeverely puniſhed, for a warning to all others that ſhall dare (on any pretence whatſoever) infringe our *Engliſh* liberties *. For ſo the lord † *Coke* having (elſewhere) with deteſtation mentioned their ſtory, pathetically concludes; '*Qui eorum veſtigiis inſiſtant, exitus perhorreſcant.*' 'Let all thoſe 'who ſhall preſume to tread their ſteps, tremble at 'their dreadful end.' Other inſtances of a later date might be given, but I ſuppoſe theſe may ſuffice.

Jurym. Yes, ſurely; ‡ and by what you have diſcourſed of the long-continued uſe of Juries, and the zealous regards our anceſtors had not to part with them, I perceive that they were eſteemed a ſpecial privilege. Be pleaſed, therefore, to acquaint me, wherein the *excellency* and *advantages* to the people, by that method of trial above others, may conſiſt.

Barr. This queſtion ſhews you have not been much converſant abroad, to obſerve the miſerable condition of the poor people in moſt other nations, where they are

* See Sir *Rich. Baker*'s Chron. *p.* 254, printed in 1674.

† 4 *part* Inſtitut. *fol.* 41.

‡ The Juryman having been inſtructed in the *antiquity* of Juries, is now going to enquire wherein their *advantage* conſiſts. The Barriſter accordingly ſhews the benefits which may ariſe from them. Thus the author performs the *ſecond* part of what he propoſed in the title-page.

are either wholly ſubject to the deſpotic arbitrary luſt of their rulers; or at beſt under ſuch laws as render their lives, liberties, and eſtates, liable to be diſpoſed of at the diſcretion of ſtrangers appointed their judges; moſt times mercenary, and creatures of prerogative; ſometimes malicious and oppreſſive; and often partial and corrupt*. Or ſuppoſe them ever ſo juſt and upright, yet ſtill has the ſubject no ſecurity againſt the attacks of unconſcionable witneſſes. Yea, where there is no ſufficient evidence, upon bare ſuſpicions, they are obnoxious to the tortures of the rack, which often make an innocent man confeſs himſelf guilty, merely to get out of preſent pain. Is it not then an ineſtimable happineſs to be born, and live under ſuch a mild and righteous conſtitution, wherein all theſe miſchiefs (as far as human prudence can provide) are prevented? where none can be condemned, either by the power of ſuperior enemies, or the raſhneſs or ill-will of any judge, nor by the bold affirmations of any profligate evidence: but no leſs than twelve honeſt, ſubſtantial, impartial men, his neighbours (who conſequently cannot be preſumed to be unacquainted either with the matters charged, the priſoner's courſe of life, or the credit of the evidence) muſt firſt be fully ſatisfied in their conſciences, that he is guilty; and ſo all unanimouſly pronounce him upon their oaths? Are not theſe, think you, very material privileges? †

Jurym.

* See all this excellently made out, and more at large, by the L. C. J. *Forteſcue*, afterwards chancellor to K. *Hen.* VI. in his Book *De laudibus Legum Angliæ*, cap. 26, 27, 28, 29.

† It may be of importance to add one obſervation here; —Though a parliament, to ſupply the neceſſities and purpoſes

Jurym. Yes, certainly; though I never ſo well conſidered them before. But now I plainly ſee our forefathers had, and we ſtill have, all the reaſon in the world to be zealous for the maintenance and preſervation thereof from ſubverſion or encroachments, and to tranſmit them entire to poſterity. For, if once this bank be broken down or neglected, an ocean of oppreſſion, and the ruins of infinite numbers of people, (as in *Empſon* and *Dudley*'s days) may eaſily follow, when on any pretence they may be made criminals, and then fined in vaſt ſums, with pretext to enrich the king's coffers, but indeed to feed thoſe inſatiate vultures that promote ſuch unreaſonable proſecutions. But ſince you have taught me ſo much of the *antiquity* and *excellency* of juries, I cannot but crave the continuance of your favour, to acquaint me ſomewhat more particularly of their *office* and *power* by law.

Barr. ‡ I ſhall gladly comply with ſo reaſonable and juſt a requeſt. † 'A jury of twelve men are by 'our laws the only proper judges of the matter in 'iſſue before them.' As for inſtance,

1. That teſtimony which is delivered to induce a jury to believe, or not to believe, the matter of fact in iſſue, is called in law EVIDENCE; becauſe thereby the jury may, out of many matters of fact, *Evidere veritatem*;

poſes of an abandoned adminiſtration, ſhould oppreſs us with taxes; while the conſtitution remains, in other reſpects, unviolated, the continuance of Juries in their legal force will ſecure our reputations, our perſonal liberties, our limbs, and our lives.

‡ The author now proceeds to the execution of the third, and laſt part of his propoſed plan.

† See *Coke*, 4th part of Inſtit. *fol.* 84.

veritatem; that is, ſee clearly the truth, of which they are proper judges.

2. When any matter is ſworn, or [when a] deed [is] read, or offered, whether it ſhall be believed, or not, or whether it be true, or falſe, in point of fact, the jurors are proper judges.

3. Whether ſuch an act was done, in ſuch, or ſuch a manner, or to ſuch, or ſuch, an intent, the jurors are judges. For the court is not judge of theſe matters, which are evidence to prove, or diſprove, the thing in iſſue. And therefore the witneſſes are always ordered to direct their ſpeech to the jury; they being the proper judges of their teſtimony. And in all pleas of the crown (or matters criminal) the priſoner is ſaid 'to put himſelf for trial upon his country;' which is explained and referred by the clerk of the court, to be meant of the jury, ſaying to them, 'Which 'country you are.'

Jurym. Well then, what is the part of the king's juſtices, or the court? what are they to take cognizance of, or do, in the trials of mens lives, liberties, and properties?

Barr. Their office, in general, is to do equal juſtice and right: particularly,

1. To ſee that the jury be regularly returned and duly ſworn.

2. To ſee that the priſoner (in caſes where it is permitable) be allowed his lawful challenges.

3. To adviſe by law, whether ſuch matter may be given in evidence, or not; ſuch a writing read, or not; or ſuch a man admitted to be a witneſs, *&c.*

4. Becauſe by their learning, and experience, they are preſumed to be beſt qualified to aſk pertinent queſtions, and, in the moſt perſpicuous manner, ſooneſt

ſooneſt to ſift out truth from amongſt tedious impertinent circumſtances and tautologies: they therefore commonly examine the witneſſes in the court; yet not excluding the jury, who of right *may*, and, where they ſee cauſe, *ought* to aſk them any neceſſary queſtions; which undoubtedly they may lawfully do with modeſty and diſcretion, without begging any leave. For if *aſking leave* be neceſſary, it implies in the court a right when they liſt to deny it; and how then ſhall the jury know the truth? And ſince we ſee, that council, who too often (——*Pudet hæc opprobria nobis*) for their fees ſtrive only to baffle witneſſes, and ſtifle truth, take upon them daily to interrogate the evidence; it is abſurd to think that the Jurors ſhould not have the ſame privilege, who are upon their oaths, and proper judges of the matter.

5. As a diſcreet and lawful aſſiſtant to the Jury, * they do often recapitulate and ſum up the heads of the evidence: but the Jurors are ſtill to conſider whether it be done truly, fully and impartially; for one man's memory may ſooner fail than twelve's. He may likewiſe ſtate the law to them; that is, deliver his opinion where the caſe is difficult, or they deſire it. But ſince, *ex facto jus oritur*, all matter of law ariſes out of matter of fact, ſo that till the fact is ſettled there is no room for law: therefore all ſuch diſcourſes of a judge to a Jury are, or ought to be, hypothetical, not coercive; conditional, and not poſitive: *viz.* 'If you find 'the fact thus or thus' (ſtill leaving the Jury at liberty to find as they ſee cauſe) 'then you are to find for the 'plaintiff; but if you find the fact thus, or thus, then 'you are to find for the defendant, or the like;' guilty, or not guilty, in caſes criminal.

* *Vaughan*'s Reports in *Buſhell*'s caſe, *fol.* 141.

Laſtly, they are to take the verdict of the Jury, and thereupon to give judgment according to law. For the office of a judge (as *Coke* well obſerves) is *jus dicere*, not *jus dare*; not to make any laws by ſtrains of wit, or forced interpretations; but plainly, and impartially to declare the law already eſtabliſhed. Nor can they refuſe to accept the Jury's verdict when agreed: for if they ſhould, and force the Jury to return, and any of them ſhould miſcarry for want of accommodation, it would undoubtedly be murther; and in ſuch caſe the Jury may, without crime, force their liberty; becauſe they are illegally confined, (having given in their verdict, and thereby honeſtly diſcharged their office,) and are not to be ſtarved for any man's pleaſure.

Jurym. But I have been told, that a Jury is only judge of naked *matter of fact*, and are not at all to take upon them to meddle with, or regard, *matter of law*, but leave it wholly to the court.

Barr. 'Tis moſt true, Jurors are judges of matters of fact: that is their proper province, their chief buſineſs; but yet not excluding the conſideration of matter of law, as it ariſes out of, or is complicated with, and influences the fact. For to ſay, they are not at all to meddle with, or have reſpect to, law in giving their verdicts, is not only a falſe poſition, and contradicted by every day's experience; but alſo a very dangerous and pernicious one; tending to defeat the principal end of the inſtitution of Juries, and ſo ſubtilly to undermine that which was too ſtrong to be battered down.

1. It is falſe: For, though the direction, as to matter of law ſeparately, may belong to the judge, and the finding the matter of fact does, peculiarly, belong to the Jury; yet muſt your Jury alſo apply matter of fact and law together; and from their conſidera-

tion

tion of, and a right judgment upon both, bring forth their verdict: For do we not see in most general issues, as upon not guilty—pleaded in trespass, breach of the peace, or felony, though it be *matter in law* whether the party be a *trespasser*, a breaker of the peace, or a felon; yet the Jury do not find the fact of the case *by itself*, leaving the law to the court; but find the party guilty, or not guilty, *generally?* So as, though they answer not to the question *singly*, what is law? yet they determine the law, in all matters, where *issue is joined.* So likewise is it not every day's practice, that when persons are indicted for murther, the Jury not only find them guilty, or not guilty; but many times, upon hearing, and weighing of circumstances, bring them in, either guilty of murther, *manslaughter*, *per infortunium*, or *se defendendo*, as they see cause? Now do they not, herein, complicately resolve both law and fact? And to what end is it, that when any person is prosecuted upon any statute, the statute itself is usually read to the Jurors, but only that they may judge, whether, or no, the matter be within that statute? But to put the business out of doubt, we have the suffrage of that oracle of law, *Littleton*, who in his Tenures, sect. 368. declares, '*That if a Jury will take upon* '*them the knowledge of the law upon the matter, they* '*may.*' Which is agreed to likewise by *Coke* in his comment thereupon *. And therefore it is false to say that the Jury hath not power, or doth not use frequently to apply the fact to the law; and thence

 taking

* Before the present disputes arose, an able writer of our own times considers this, as a settled and allowed rule. See Blackstone's Commentaries, vol. I. p. 8. vol. III. p. 377, 378. particularly vol. IV. p. 354, 355. 4th ed.

taking their meaſures, judge of, and determine, the crime, or iſſue, by their verdict *.

2. As Juries have ever been veſted with ſuch power by law, ſo, to exclude them from, or diſſeiſe them of the ſame, were utterly to defeat the end of their inſtitution †. For then, if a perſon ſhould be indicted for

* Not only the expreſs aſſertion of lawyers—and the practice of the courts, prove, that Juries are authorized to determine the law, ſo far as it relates to the fact; but, in the third place, the *words*, in which verdicts muſt be given, indicate, that they have this power. If Juries had been appointed to judge of fact only, the words 'done,' or 'not done,' or words of a like import, would have been ſubſtituted for the words 'guilty,' or 'not guilty.' However, as our anceſtors have placed it in their option to determine the law, ſo far as it is connected with the fact; the language of their verdicts comprehends, when neceſſary, their ſentiments upon both. If an action is ſaid to be criminal, it is *neceſſary* to determine whether the action happened:—So that when a Jury declares that a man is guilty, the fact is implied; becauſe they cannot affix guilt, where there is no fact. When a Jury declares a man not guilty, the determination of the fact is left uncertain; becauſe it is *unneceſſary*; for the law concerns itſelf with actions, only ſo far, as they are criminal.

† From the doctrine, that Juries, in the caſe of libels, are not judges of law, as well as fact, neceſſarily flows the following abſurdity; viz. that it is the duty of Juries to declare men guilty, or not guilty, in whom they perceive neither guilt, or innocence.—— Again: If, becauſe a circumſtance is eſtabliſhed as a fact, it is to be reputed as a crime, every incident which happens, is a crime. Now, if printing and publiſhing only be criminal, it is criminal to print and publiſh the Book of Common Prayer, and the Bible.

It

for doing any common innocent act, if it be but clothed, and diſguiſed, in the indictment, with the name of treaſon, or ſome other high crime, and proved, by witneſſes, to have been done by him; the Jury, though ſatisfied in conſcience, that the fact is not any ſuch offence as it is called, yet becauſe (according to this fond opinion) they have no power to judge of law, and the fact charged is fully proved, they ſhall, at this rate, be bound to find him guilty: And being ſo found, the judge may pronounce ſentence againſt him, for he finds him a convicted traitor, &c. by his peers. And thus, as a certain phyſician boaſted, that he had killed one of his patients with the beſt method in the world; ſo here ſhould we have an innocent man hanged, drawn, and quartered, and all according to law.

Jurym. God forbid that any ſuch thing ſhould be practiſed! and indeed I do not very fully underſtand you.

Barr. I do not ſay it ever *hath been*, and I hope it never *will be* practiſed: But this I will ſay, that according to this doctrine, it *may be*; and conſequently Juries may thereby be rendered, rather a ſnare, or en-

It is hard to ſay, on what principles this right of Juries can be diſputed. "If Jurymen, becauſe not bred to the law, are ſuppoſed incapable of knowing what is, or what is not, law; it follows that none but lawyers can juſtly be puniſhed for a breach of the law: for, ſurely, that man is rather unfortunate, than faulty, who ignorantly tranſgreſſes the law."—Beſides, if it is wiſe to veſt the determination of law, where it concerns facts, in the Jury, when any civil or criminal ſuit is in queſtion; certainly it is wiſe to entruſt the Jury with the ſame power, in all ſuits which particularly concern the ſtate: becauſe, in ſuch ſuits, the determination is always of more conſequence, and judges are more likely to be under an influence, which is injurious to the rights of the people.

gine of oppreſſion, than any advantage or guardian of our legal liberties againſt arbitrary injuſtice; and made mere properties to do the drudgery, and bear the blame of unreaſonable proſecutions. And ſince you ſeem ſo dull as not to perceive it, let us put an imaginary caſe; not in the leaſt to abet any irreverence towards his Majeſty, but only to explain the thing, and ſhew the abſurdneſs of this opinion.—— Suppoſe then a man ſhould be indicted, For that he as a falſe traitor, not having the fear of God before his eyes, *&c.* did, traiterouſly, preſumptuouſly, againſt his allegiance, and with an intent to affront his Majeſty's perſon, and government, paſs by ſuch, or ſuch, a royal ſtatue, or effigies, with his hat on his head, to the great contempt of his Majeſty and his authority, the evil example of others, againſt the peace, and his Majeſty's crown and dignity. Being hereupon arraigned, and having pleaded not guilty, ſuppoſe that ſufficient evidence ſhould ſwear the matter of fact laid in the indictment, *viz.* That he did paſs by the ſtatue, or picture, with his hat on; now imagine yourſelf one of the Jury that were ſworn to try him;—what would you do in the matter?

Jurym. Do? why I ſhould be ſatisfied in my conſcience, that the man had not, herein, committed any crime, and ſo I would bring him in, not guilty.

Barr. You ſpeak as any honeſt man would do: but I hope you have not forgot the point we were upon. Suppoſe therefore, when you thought to do thus, the court, or one of your brethren, ſhould take you up, and tell you, that it was out of your power ſo to do: 'For look ye (ſaith he) my maſters! we Jurymen are 'only to find matter of fact; which being fully pro-'ved, as in this caſe before us it is, we muſt find the

'party

'party guilty. Whether the thing be treaſon, or not, 'does not belong to us to enquire; it is ſaid ſo here, 'you ſee, in the indictment; and let the court look 'to that, they know beſt. We are not judges of law. 'Shall we meddle with niceties and punctilio's, and go 'contrary to the directions of the court? So perhaps 'we ſhall bring ourſelves into a *Præmunire* (as they 'ſay) and perhaps never be ſuffered to be Jurymen 'again. No, no, the matter of fact you ſee is proved, 'and that is our buſineſs; we muſt go according to 'our evidence, we cannot do leſs: truly it is ſome-'thing hard, and I pity the poor man, but we can-'not help it,' *&c.* After theſe notable documents, what would you do now?

Jurym. I ſhould not tell what to ſay to it; for I have heard ſeveral ancient Jurymen ſpeak to the very ſame effect, and thought they talked very wiſely.

Barr. Well then, would you conſent to bring in the man guilty?

Jurym. Truly I ſhould be ſomewhat unwilling to do it; but I do not ſee which way it can be avoided, but that he muſt be found guilty of the fact.

Barr. God keep every honeſt body from ſuch Jurymen! Have you no more regard to your Oath? to your Conſcience? to Juſtice? to the Life of a man?

Jurym. Hold! hold! perhaps we would not bring him in guilty generally, but only guilty of the fact*; finding no more, but, guilty of paſſing by the ſtatue with his hat on.

Barr. This but poorly mends the matter, and ſignifies little or nothing: for ſuch a finding hath generally been refuſed by the court, as being no verdict; though, it is ſaid, it was lately allowed ſomewhere in a caſe that

* Is not this exactly ſimilar to a late verdict given in the caſe of the King againſt *Woodfall?*

that required favour. But, ſuppoſe it were accepted, what do you intend ſhould become of the priſoner? Muſt not he be kept in priſon till all the judges are at leiſure, and willing, to meet, and argue the buſineſs? *Ought* you not, and what reaſon can you give why you *ſhould* not, abſolutely acquit, and diſcharge him? Nay, I do aver, you are bound, by your oaths, to do it; by ſaying with your mouths to the court, what your conſcience cannot but dictate to yourſelves, '*not guilty.*' For pray conſider, are you not ſworn, That you will well and truly try, and true deliverance * make? There is none of this ſtory, of matter of fact, diſtinguiſhed from law, in your oath; but you are, 'well,' that is, *fully*, and 'truly,' that is, *impartially*, to try the priſoner. So that if upon your conſciences, and the beſt of your underſtanding, by what is proved againſt him, you find he is guilty of that crime wherewith he ſtands charged, that is, deſerving Death, or ſuch other puniſhment as the law inflicts upon an offence ſo denominated; then you are to ſay, he is guilty. But if you are not ſatisfied, that either the act he has committed, was *treaſon, or other crime*, (though it be never ſo often called ſo); or that the act itſelf, if it were ſo criminal, *was not done:* then what remains, but, that you are to acquit him? for the end of Juries is to preſerve men from Oppreſſion; which may happen, as well by impoſing, or ruining them for that as a crime, which indeed is none, or at leaſt not ſuch, or ſo great, as is pretended; as by charging them with the commiſſion of that, which, in truth, was not committed. And how do you well, and truly try, and true deliverance make, when indeed you do but deliver him up to others to be condemned, for that, which yourſelves do not believe to be any crime?

Jurym;

* Of their *verdict*, this is meant.

Jurym. Well; but the ſuppoſed caſe is a caſe unſuppoſable. It is not to be imagined, that any ſuch thing ſhould happen; nor to be thought, that the judges will condemn any man, though brought in guilty by the Jury, if the matter, in itſelf, be not ſo criminal by law.

Barr. It is moſt true, I do not believe that ever that caſe will happen. I put it in a thing of apparent abſurdity, that you might the more clearly obſerve the unreaſonableneſs of this doctrine; but withal I muſt tell you, that it is not impoſſible that ſome other caſes may really happen, of the ſame, or the like nature, though more fine, and plauſible. And, though we apprehend not, that during the reign of his Majeſty that now is, (whoſe life God long preſerve) any Judges will be made, that would ſo wreſt the law; yet what ſecurity is there, but that ſome ſucceſſors may not be ſo cautious in their choice? and, though our benches of judicature be at preſent furniſhed with gentlemen of great integrity, yet, there may one day happen ſome *Treſilian*, or kinſman of *Empſon*'s, to get in, (for what has been, may be) who, *Empſon*-like, too, ſhall pretend it to be for his maſter's ſervice to increaſe the number of criminals, that his coffers may be filled with fines, and forfeitures: and then ſuch miſchiefs may ariſe. And Juries, having *upon confidence* parted with their juſt privileges, ſhall then, too late, ſtrive to reaſſume them, when the number of ill precedents ſhall be vouched to inforce that as of right, which in truth was at firſt a wrong, grounded on eaſineſs and ignorance. Had our wiſe, and wary anceſtors, thought fit to depend ſo far upon the contingent honeſty of judges, they needed not to have been ſo zealous to continue the uſage of Juries *. *Jurym.*

* If the reader is deſirous of ſeeing the many unhappy conſequences, to which ſuch a dependance would ſubject us;

Jurym. Yet ſtill I have heard, that in every indictment, or information, there is always ſomething of form, or law, and, ſomething elſe, of fact; and it ſeems reaſonable, that the Jury ſhould not be bound up nicely to find every formality therein expreſſed, or elſe to acquit (perhaps) a notorious criminal. But if they find the eſſential matter of the crime, then they ought to find him guilty.

Barr. You ſay true, and therefore muſt note, that there is a wide difference to be made between words of courſe, raiſed by implication of law, and eſſential words, that either make, or really aggravate, the crime charged. The law does ſuppoſe and imply every treſpaſs, breach of the peace, every felony, murder, or treaſon, to be done Vi et Armis, with force, and arms, &c. Now, if a perſon be indicted for murder by poiſon, and the matter proved; God forbid the jury ſhould ſcruple the finding him guilty upon the indictment, merely becauſe they do not find that part of it, as to force, and arms, proved! for that is implied as a neceſſary, or allowable, fiction of law.

But on the other ſide, when the matter in iſſue, in itſelf, and taken as a naked propoſition, is of ſuch a nature, as no action, indictment, or information will lie for it ſingly; but it is worked up by ſpecial aggravations into matter of damage, or crime; (as that it was done to ſcandalize the government, to raiſe ſedition, to affront authority, or the like, or with ſuch, or ſuch, an evil intent): If theſe aggravations, or ſome overt act

us; let him read the ſecond poſtſcript to the Letter to Almon in matter of Libel. There are many obſervations in that publication, which give great confirmation to the doctrines here laid down, and ſhew the writer to have been poſſeſſed of exceedingly great abilities, judgment, and learning.

act to manifeſt ſuch ill deſign, or intention, be not made out by evidence, then ought the Jury to find the party, not guilty. For example:

Biſhop *Latimer* (afterwards a martyr in bloody queen *Mary*'s days, for the Proteſtant religion) in his ſermon preached before the moſt excellent king *Edward* VI. delivered theſe words: 'I muſt deſire your 'grace to hear poor men's ſuits yourſelf. The ſay-'ing is now, "That money is heard every where:" —"If he be rich, he ſhall ſoon have an end of his "matter." Others are fain to go home with weep-'ing tears for any help they can obtain at any judge's 'hand. Hear men's ſuits yourſelf, I require you in 'God's behalf; and put them not to the hearing of 'theſe velvet-coats, theſe up-ſkips. Amongſt all 'others, one eſpecially moved me at this time to 'ſpeak: This it is, Sir: A gentlewoman came and 'told me, that a great man keepeth certain lands of 'hers from her, and will be her tenant in ſpite of 'her teeth. And that in a whole twelve-month 'ſhe could not get but one day for the hearing of 'her matter, and the ſame day, when it ſhould be 'heard, the great man brought on his ſide a great 'ſight of lawyers for his council. The gentlewoman 'had but one man of law, and the great man 'ſhakes him ſo, that he cannot tell what to do. So 'that when the matter came to the point, the judge 'was a means to the gentlewoman, that ſhe ſhould 'let the great man have a quietneſs in her land.—I 'beſeech your grace, that ye would look to theſe 'matters.

'And you proud judges! hearken what God ſaith 'in his holy book; *Audite illos, ita parvum, ut mag-'num*, Hear them (ſaith he) the ſmall as well as the

'great;

'great; the poor as well as the rich; regard no per-
'ſon, fear no man. And why? *Quia Domini judi-*
'*cium eſt*, The judgment is God's. Mark this ſay-
'ing, thou proud judge; the devil will bring this
'ſentence againſt thee at the day of doom. Hell will
'be full of theſe judges, if they repent not, and
'amend: they are worſe than the wicked judge that
'Chriſt ſpeaketh of, *Luke* the 19th, that neither
'feared God, nor the world. Our judges are worſe
'than this judge was; for they will neither hear
'men for God's ſake, nor fear of the world, nor
'importunateneſs, nor any thing elſe; yea, ſome of
'them will command them to * ward if they be
'importunate.—I heard ſay, that when a ſuitor came
'to one of them, he ſaid, "What fellow is it, that
"giveth theſe folks counſel to be ſo importunate?
"He deſerves to be puniſhed, and committed to
"ward." Marry, Sir, puniſh me then; it is even I
'that gave them counſel. I would gladly be puniſhed
'in ſuch a cauſe; and if you amend not, I will cauſe
'them to cry out upon you ſtill; even as long as
'I live.'——Theſe are the very words of that good
biſhop, and martyr, father *Latimer:* 'But now-a-
'days the judges be afraid to hear a poor man againſt
'the rich; inſomuch, they will either pronounce
'againſt him, or ſo drive off the poor man's ſuit,
'that he ſhall not be able to go through with it †.'

Jurym. Truly they are ſomewhat bold, but I think very honeſt ones. But what ſignify they to our diſcourſe?

Barr. Only this;—Suppoſe the judges of thoſe times, thinking themſelves aggrieved by ſuch his freedom, ſhould have brought an indictment againſt him, ſetting

* Priſon. † See alſo *Latimer*'s Third Sermon.

ſetting forth, that ‘ falſly, and maliciouſly, intending ‘ to ſcandalize the government, and the adminiſtra- ‘ tion of juſtice, in this realm, and to bring the ſame ‘ into contempt, he did ſpeak, publiſh, and declare ‘ the falſe, and ſcandalous, words before recited.’

Jurym. I conceive, the judges had more wit, than to trouble themſelves about ſuch a buſineſs.

Barr. That is nothing to the purpoſe; but ſuppoſe, I ſay, by them, or any body elſe, it had been done; and his ſpeaking the words had been proved; and you had then been living, and one of the Jury?

Jurym. I would have pronounced him not guilty, and been ſtarved to death before I would have conſented to a contrary verdict; becauſe the words in themſelves are not criminal, nor reflecting upon any particulars; and as for what is ſuppoſed to be laid in the indictment, or information, (‘ that they were pub- ‘ liſhed, or ſpoken, to ſcandalize the government, ‘ and the adminiſtration of juſtice, or to bring the ‘ ſame into contempt’) nothing of that appears.

Barr. You reſolve, as every honeſt, underſtanding, conſcientious man, would do in the like caſe; for when a man is proſecuted for that, which, in itſelf, is no crime, how dreadfully ſoever it may be ſet out, (as the inquiſitors in *Spain* uſe to clothe innocent Proteſtants, whom they conſign to the flames, with *Sambenito's*, garments all over bepainted with Devils; that the people beholding them in ſo helliſh a dreſs, may be ſo far from pitying them, that they may rather condemn them in their thoughts as miſcreants not worthy to live, though in truth they know nothing of their cauſe;)—yet I ſay, notwithſtanding any ſuch bugbear artifices, an innocent man ought to be acquitted, and not he and all his family ruined, and per-

haps utterly undone, for words, or matters, harmleſs in themſelves, and poſſibly very well intended, but only rendered criminal, by being thus hideouſly dreſſed up, and wreſted with ſome far-fetched, forced, and odious conſtruction.

Jurym. This is a matter well worthy the conſideration of all Juries; for indeed I have often wondered to obſerve the adverbs in declarations, indictments, and informations, in ſome caſes to be harmleſs vinegar and pepper, and in others, henbane ſteeped in *aqua fortis.*

Barr. That may eaſily happen, where the Jury does not diſtinguiſh legal implications, from ſuch as conſtitute, or materially aggravate, the crime: for if the Jury ſhall honeſtly refuſe to find the latter in caſes where there is not direct proof of them, (*viz.* That ſuch an act was done falſly, ſcandalouſly, maliciouſly, with an intent to raiſe ſedition, defame the government, or the like,) their mouths are not to be ſtopt, nor their conſciences ſatisfied with the court's telling them—You have nothing to do with that; it is only matter of form or matter of law: you are only to examine the fact, whether he ſpoke ſuch words, wrote, or ſold, ſuch a book, or the like.* For now, if they ſhould ignorantly take this for an anſwer, and bring in the priſoner guilty, though they mean and intend, of the naked fact, or bare act, only; yet the clerk recording it, demands a further confirmation, ſaying to them,

* A prophet!—Our modern patriots have often been the ſubjects of ridicule, on account of their apprehenſions: however, we have lived to ſee the completion of ſeveral predictions, here made by one of our anceſtors; and our poſterity may, in the ſame manner, have reaſon to be convinced, that thoſe made in our times are not entirely without foundation.

them, thus; 'Well then, you ſay *A. B.* is guilty of the 'treſpaſs, or miſdemeanour, in manner, and form, as 'he ſtands indicted; and ſo you ſay all?' To which the foreman anſwers for himſelf and his fellows, 'Yes.' Whereupon the verdict is drawn up—'*Juratores ſuper 'ſacramentum ſuum dicunt*,' &c. 'The Jurors do ſay up-'on their oaths, that *A. B.* malicioufly, in contempt of 'the king and the government, with an intent to ſcan-'dalize the adminiſtration of juſtice, and to bring the 'ſame into contempt, or to raiſe ſedition,' &c. (as the words before were laid); ſpake ſuch words, publiſhed ſuch a book, or did ſuch an act, againſt the peace of our lord the king, his crown and dignity.

Thus a VERDICT, ſo called in law, *quaſi veritatis*, becauſe it ought to be the *voice*, or *ſaying*, of TRUTH† itſelf, may become compoſed in its material part of falſhood. Thus twelve men ignorantly drop into a perjury. And will not every conſcientious man tremble to pawn his ſoul under the ſacred, and dreadful ſolemnity of an oath, to atteſt, and juſtify, a lye upon record to all poſterity? beſides the wrong done to the priſoner, who thereby perhaps comes to be hanged, (and ſo the Jury *in foro conſcientiæ* are certainly guilty of his murther;) or at leaſt by fine, or impriſonment, undone, with all his family, whoſe juſt curſes will fall heavy on ſuch unjuſt Jurymen, and all their poſterity, that againſt their oaths, and duty, occaſioned their cauſeleſs miſery. And is all this, think you, nothing but a matter of formality?

Jurym. Yes, really, a matter of vaſt importance, and ſad conſideration; yet I think you charge the miſchiefs done by ſuch proceedings a little too heavy upon the Jurors. Alas, good men! they mean no

† *Verè dictum.*

harm; they do but follow the directions of the court: if any body ever happen to be to blame in ſuch caſes, it muſt be the judges.

Barr. Yes, forſooth! that's the Jurymen's common plea; but do you think it will hold good in the court of Heaven? 'Tis not enough that we mean no harm, but we muſt do none neither; eſpecially in thing sof that moment. Nor will ignorance excuſe, where it is affected, and where duty obliges us to inform ourſelves better, and where the matter is ſo plain and eaſy to be underſtood.

As for the judges, they have a fairer plea than you, and may quickly return the burthen back upon the Jurors: For 'we,' may they ſay, 'did nothing but our 'duty, according to uſual practice: the Jury, his 'peers, had found the fellow guilty, upon their oaths, 'of ſuch an odious crime, and attended with ſuch vile 'preſumptions, and dangerous circumſtances. They 'are judges; we took him as they preſented him to 'us; and according to our duty pronounced the ſen-'tence, that the law inflicts in ſuch caſes, or ſet a fine, 'or ordered corporeal puniſhment upon him, which 'was very moderate, conſidering the crime laid in the 'indictment, or information, and of which they had 'ſo ſworn him guilty. If he were innocent, or not 'ſo bad as repreſented, let his deſtruction lie upon the 'Jury, *&c.*' At this rate, if ever we ſhould have an unconſcionable judge, might he argue; and thus the guilt of the blood, or ruin, of an innocent man, when it is too late, ſhall be bandied to and fro, and ſhuffled off from the Jury to the Judge, and from the Judge to the Jury; but really ſticks faſts to both, but eſpecially on the Jurors; becauſe the very end of their inſtitution was to prevent all dangers of ſuch oppreſ-

ſion;

ſion; and in every ſuch caſe, they do not only wrong their own ſouls, and irreparably injure a particular perſon, but alſo baſely betray the liberties of their country in general. For as, *without* their ill compliance and act, no ſuch miſchief can happen;—ſo *by* it, ill precedents are made, and the plague is increaſed; honeſter Juries are diſheartened, or ſeduced by cuſtom from their duties; juſt privileges are loſt by diſuſer; and perhaps within a while ſome of themſelves may have an hole picked in their coats, and then they are tried by another Jury juſt as wiſe, and honeſt, and ſo deſervedly come to ſmart under the ruinating effects, and example, of their own folly and injuſtice.

Jurym. You talk of folly, and blame Jurymen, when indeed they cannot help it. They would ſometimes find ſuch a perſon guilty, and ſuch an one innocent, and are perſuaded they ought ſo to do; but the court over-rules, and forces them to do otherwiſe.

Barr. How, I pray?

Jurym. How? why, did you never hear a Jury threatened to be fined and impriſoned, if they did not comply with the ſentiments of the court?

Barr. I have read of ſuch doings, but I never heard, or ſaw it done: and indeed I do not doubt but our ſeats of juſtice are furniſhed with both better men, and better lawyers, than to uſe any ſuch menaces, or dureſs; for undoubtedly it is a baſe, and very illegal, practice. But, however, will any man that fears God, nay, that is but an honeſt heathen, debauch his conſcience and forſwear himſelf; do his neighbour injuſtice; betray his country's liberties, and conſequently enſlave himſelf, and his poſterity; and all this merely, becauſe he is hectored, and threatened a little?

Jurym. I know it ſhould not ſway with any: but alas! a priſon is terrible to moſt men, whatever the cauſe be; and the fine may be ſuch, if one ſhall refuſe to comply, as may utterly ruin one's family.

Barr. Fright not yourſelf; there is no cauſe for this ague-fit, to ſhake your conſcience out of frame: if you are threatened, 'tis but *brutum fulmen*, lightning without a thunderbolt, nothing but big words; for it is well known, THAT THERE IS NEVER A JUDGE IN ENGLAND THAT CAN FINE, OR IMPRISON, ANY JURYMAN IN SUCH A CASE.

Jurym. Good Sir! I am half aſhamed to hear a Barriſter talk thus: have not ſome in our memory been fined and impriſoned? And ſure that which has actually been done, is not altogether impoſſible.

Barr. Your ſervant, Sir! under favour of your mighty wiſdom, and experience, when I ſaid no judge could do it, I ſpake the more like a Barriſter; for it is a maxim in law—*Id poſſumus, quod Jure poſſumus*; 'a 'man is ſaid to be able to do only ſo much, as he may 'lawfully do.' But ſuch fining, and impriſoning, cannot lawfully be done; the judges have no right, or power, by law, to do it; and therefore it may well be ſaid, they cannot, or are not able, to do it.

And whereas you ſay, that ſome Juries in our memory have been fined and impriſoned, you may poſſibly ſay true; but it is as true, that it hath been only in our memory; for no ſuch thing was practiſed in antient times; for ſo I find it aſſerted by a late learned judge *, in theſe poſitive words: 'No caſe can 'be offered, either before attaints granted in general, 'or after, that ever a Jury was puniſhed by fine and 'impriſonment by any Judge, for not finding accord-

'ing

* Lord chief juſtice *Vaughan*, in his Reports, fol. 146.

'ing to their evidence, and his direction, until *Pop-*
'*ham*'s time; nor is there clear proof, that he ever
'fined them for that reaſon, ſeparated from other miſ-
'demeanours.' And fol. 152, he affirms, 'That no
'man can ſhew, that a Jury was ever puniſhed upon
'an information, either at law, or in the Star-cham-
'ber, where the charge was only for finding againſt
'their evidence, or giving an untrue verdict; unleſs
'imbracery, ſubornation, or the like were joined.' So
that, you ſee, the attempt is an innovation, as well as
unjuſt; a thing unknown to our fore-fathers, and the
ancient ſages of the law: and therefore ſo much the
more to be watched againſt, reſiſted, and ſuppreſſed,
whilſt young; leſt in time this crafty cockatrice's egg,
hatched, and foſtered by ignorance, and puſillanimous
compliance, grow up into a ſerpent too big to be maſ-
tered, and ſo blaſt, and deſtroy the firſt-born of our
Engliſh freedoms. And indeed (bleſſed be God) it hath
hitherto been rigorouſly oppoſed as often as it durſt
crawl abroad; being condemned in parliament, and
knocked o'th' head by the reſolutions of the judges upon
ſolemn argument: as, by and by, I ſhall demonſtrate.

Jurym. Well, but are Jurors not liable then to fine
or impriſonment, in any caſe whatſoever?

Barr. Now you run from the point; we were talk-
ing of giving their verdict, and you ſpeak of any caſe
whatſoever. Whereas you ſhould herein obſerve a ne-
ceſſary diſtinction, which I ſhall give you in the words
of that learned judge laſt recited*: 'Much of the office
'of Jurors, in order to their verdict, is MINISTERIAL:
'as not withdrawing from their fellows after they are
'ſworn; not receiving from either ſide evidence not
'given in court; not eating and drinking before their
'verdict; refuſing to give a verdict, &c. wherein if they
'tranſgreſs,

* *Vaughan*'s Reports, fol. 152.

'transgreſs, they may be finable. But the verdict itſelf, 'when given, is not an act miniſterial, but JUDICIAL, 'and (ſuppoſed to be) according to the beſt of their 'judgment; for which they are not finable, nor to be 'puniſhed, but by attaint;' that is, by another Jury, in caſes where an attaint lies, and where it ſhall be found that, *wilfully*, they gave a verdict, falſe and corrupt.

Now that Juries, otherwiſe, are in no caſe puniſhable, nor can (for giving their verdict according to their conſciences, and the beſt of their judgment) be legally fined or impriſoned by any judge, on colour of not going according to their evidence, or finding contrary to the directions of the court; is a truth, both founded on unanſwerable reaſons, and confirmed by irrefragable authorities.

Jurym. Thoſe I would gladly hear.

Barr. They are many, but ſome of the moſt evident are theſe that follow. As for reaſons:

1. A Jury ought not to be fined, or impriſoned, becauſe they do not follow the judge's directions; for if they do follow his directions, they may yet be attainted: and to ſay they gave their verdict according to his directions, is no bar but the judgment ſhall be reverſed, and they puniſhed for doing that, which if they had not done, they ſhould (by this opinion) have been fined, and impriſoned, by the judge.—Which is unreaſonable.

2. If they do not follow his direction, and be therefore fined, yet they may be attainted, and ſo they ſhould be doubly puniſhed by diſtinct judicatures for the ſame offence; which the common law never admits.

3. To what end is the Jury to be returned out of the vicinage (that is, the neighbourhood) whence the iſſue ariſeth? to what end muſt hundredors be of the Jury, whom the law ſuppoſeth to have nearer knowledge of the fact than thoſe of the vicinage in general? to what

end

end are they challenged ſo ſcrupulouſly to the array and poll? to what end muſt they have ſuch a certain freehold, and be *probi*, & *legales*, *homines*, and not of affinity with the parties concerned, &c. if after all this, they implicitly muſt give a verdict by the dictates, and authority of another man, under pain of fines, and impriſonment, when ſworn to do it according to the beſt of their own knowledge? A man cannot ſee by another's eye, nor hear by another's ear; no more can a man conclude, or infer, the thing to be reſolved by another's underſtanding, or reaſoning; unleſs all men's underſtandings were equally alike. And if, merely in compliance, becauſe the judge ſays thus, or thus, a Jury ſhall give a verdict; tho' ſuch their verdict ſhould happen to be right, true, and juſt; yet they being not aſſured it is ſo from their own underſtanding, are *forſworn*, at leaſt *in foro conſcientiæ*.

4. Were Jurors ſo finable, then every mayor, and bailiff of corporations, all ſtewards of leets, juſtices of peace, &c. whatever matters are tried before them, ſhall have verdicts to their minds, or elſe fine, and impriſon the Jurors till they have; ſo that ſuch muſt be either pleaſed, humoured, or gratified, elſe no juſtice, or right, is to be had in any court.

5. Whereas a perſon by law may challenge the ſheriff, or any Juryman, if of kin to his adverſary; yet he cannot challenge a mayor, recorder, juſtice, &c. who 'tis poſſible will have a verdict for their kinſman, or againſt their enemy, or elſe fine and impriſon the Jury till they have obtained it: ſo that by this means our lives, liberties, and properties, ſhall be ſolely tried by, and remain at the arbitrary diſpoſal of every mercenary, or corrupted juſtice, mayor, bailiff, or recorder, if any ſuch ſhould, at any time, get into office.

6. 'Tis

6. 'Tis unreaſonable that a Jury ſhould be finable on pretence of their going againſt their evidence; becauſe it can never be tried, whether or no in truth they did find with, or againſt, their evidence, by reaſon no writ of error lies in the caſe.

7. Were Jurymen liable to ſuch arbitrary fines, they would be in a worſe condition than the criminals that are tried by them; for in all civil actions, informations, and indictments, ſome appeals, or writs of falſe judgment, or of error, do lie into ſuperior courts to try the regular proceedings of the inferior. But here can be no after-trial, or examination; but the juryman (if fining at all were lawful) muſt either pay the fine, or lie by it; without remedy to decide, whether in his particular caſe he were legally fined, or not.

8. Without a fact agreed, it is as impoſſible for a judge, or any other, to know the law, relating to that fact, or direct concerning it, as to know an accident that hath no ſubject; for as, where there is no law, there is no tranſgreſſion, ſo where there is no tranſgreſſion, there is no place for law: for 'the law (ſaith divine authority) 'is made for the tranſgreſſor.' And as *Coke* tells us, *Ex facto jus oritur*; upon ſtating the fact, or tranſgreſſion, matter of law doth ariſe, or grow out of the root of the fact. Now the Jury being the ſole judges of fact, and matter in iſſue before them, not finding the fact on which the law ſhould ariſe, cannot be ſaid to find againſt law, which is no other than a ſuperſtructure on fact: ſo that to ſay they have found againſt the law, when no fact is found, is abſurd; an expreſſion inſignificant, and unintelligible. For no iſſue can be joined of matter in law; no Jury can be charged with the trial of matter in law barely;

no

no evidence ever was, or can be, given to a Jury, of what is law, or not: nor can any ſuch oath be given to, or taken by a Jury, to try matter in law; nor does an attaint lie for ſuch oath, if falſe, &c. But if, by finding againſt the directions of the court in matter of law, ſhall be underſtood, that if the judge having heard the evidence given in court, (for he can regularly know no other, though the Jury may) ſhall tell the Jury upon this evidence, the law is for the plaintiff, or for the defendant, and the Jury are, under pain of fine, and impriſonment, to find accordingly; then it is plain, the Jury ought of duty ſo to do. Now *if this were true*, who ſees not that the Jury is but a troubleſome delay, of great charge, much formality, and no real uſe in determining right, and wrong, but mere echoes to ſound back the pleaſure of the court; and conſequently, that trials by them might be better aboliſhed than continued? which is at once to ſpit folly in the faces of our venerable anceſtors, and enſlave our poſterity.

9. As the judge can never direct what the law is in any matter controverted, without firſt knowing the fact; ſo, he cannot, poſſibly, know the fact but from the evidence which the Jury have: but he can never fully know what evidence they have; for beſides what is ſworn in court, (which is all that the judge can know) the Jury, being of the neighbourhood, may, and oft-times do, know ſomething of their own knowledge, as to the matter itſelf, the credit of the evidence, &c. which may juſtly ſway them in delivering their verdict; and which ſelf-knowledge of theirs is ſo far countenanced by law, that it ſuppoſes them capable thereby to try the matter in iſſue, (and ſo they muſt) though no evidence were given, on either ſide,

in court. As when any man is indicted, and no evidence comes againſt him, the direction of the court always is, 'You are to acquit him, unleſs of your 'own knowledge you know him guilty;' ſo that even, in that caſe, they may find him guilty, without any witneſſes. Now how abſurd is it to think, that any judge has power to fine a Jury for going againſt their evidence, when he that ſo fineth, knoweth perhaps nothing of their evidence at all, (as in the laſt caſe) or at leaſt but ſome part of it? For how is it poſſible he ſhould lawfully puniſh them for that which it is impoſſible for him to know?

Laſtly, Is any thing more common, than for two lawyers, or judges, to deduce contrary, and oppoſite concluſions out of the ſame caſe in law? And why then may not two men infer diſtinct concluſions from the ſame teſtimony? And conſequently, may not the Judge, and Jury, honeſtly differ in their opinion, or reſult from the evidence, as well as two judges may, which often happens? And ſhall the Jurymen, merely for this difference of apprehenſion, merit fine, and impriſonment, becauſe they do that which they cannot otherwiſe do, preſerving their oath and integrity? eſpecially when by law they are preſumed to know better, and much more of the buſineſs, than the judge does, as aforeſaid.

Are not all theſe, groſs contradicting abſurdities, and unworthy (by any man that deſerves a gown) to be put upon the law of *England*; which has ever owned right reaſon for its parent, and dutifully ſubmitted to be guided thereby?

Jurym. If the law, as you ſay, be reaſon, then undoubtedly this practice of fining of Juries is moſt

illegal, ſince there cannot be any thing more unreaſonable: but what authorities have you againſt it?

Barr. You have heard it proved to be a modern upſtart encroachment, ſo you cannot expect any direct, or expreſs, condemnation of it in ancient times; becauſe the thing was not then ſet on foot. And, by the way, though negative arguments are not neceſſarily concluſive, yet that we meet with no precedents of old of Juries fined, for giving their verdict contrary to evidence, or the ſenſe of the court, is a violent preſumption that it ought not to be done: for it cannot be ſuppoſed, that this latter age did firſt of all diſcover, that verdicts were many times not according to the judge's opinion and liking. Undoubtedly they ſaw that as well as we; but knowing the ſame not to be any crime, or puniſhable by law, were ſo modeſt and honeſt, as not to meddle with it. However, what entertainment it hath met with, when attempted in our times, I ſhall ſhew you in two remarkable caſes.

1. When the late lord chief juſtice *Keeling* had attempted ſomething of that kind, it was complained of, and highly reſented by the then parliament; as appears by this copy of their proceedings thereupon, taken out of their Journal, as follows.

Die Mercurii, 11 *Decembris*, 1667.

'The houſe reſumed the hearing of the reſt of the 'report touching the matter of reſtraint upon Juries, 'and *that* upon the examination of divers witneſſes 'in ſeveral caſes of reſtraints put upon Juries by 'the lord chief juſtice *Keeling*; and thereupon re'ſolved as followeth:

'Firſt, That the proceedings of the ſaid lord chief 'juſtice, in the caſes now reported, are innovations

'in the trial of men for their lives, and liberties. And 'that he hath uſed an arbitrary, and illegal power, 'which is of dangerous conſequence to the lives and 'liberties of the people of *England*, and tends to the 'introducing of an arbitrary government.

'Secondly, That in the place of judicature the 'lord chief juſtice hath undervalued, vilified, and 'contemned MAGNA CHARTA, the great PRESER-'VER of our lives, freedom, and property.

'Thirdly, That he be brought to trial in order to 'condign puniſhment, in ſuch manner as the houſe 'ſhall judge moſt fit, and requiſite.'

Die Veneris, 13 *Decembris*, 1667.

'Reſolved, *&c.*

'That the precedents, and practice of fining, or 'impriſoning, of Jurors for giving their verdicts, 'are illegal.'

Here you ſee it branded in parliament: Next you ſhall ſee it formally condemned on a ſolemn argument by the judges. The caſe [is] thus.

At the ſeſſions for *London*, *Sept.* 1670, *William Pen*, and *William Mead* (two of the people commonly called *Quakers*) were indicted, 'for that they 'with others, to the number of three hundred, on the '14th *Aug.* 22 *Regis*, in *Gracechurch-Street*, did with 'force, and arms, *&c.* unlawfully, and tumultuouſly, 'aſſemble, and congregate themſelves together, to the 'diſturbance of the peace; and that the ſaid *William 'Pen* did there preach, and ſpeak, to the ſaid *Mead*, and 'other perſons in the open ſtreet; by reaſon whereof, 'a great concourſe, and tumult, of people in the 'ſtreet aforeſaid then, and there, a long time, did 'remain, and continue, in contempt of our ſaid lord

'the

'the king, and of his law, to the great disturbance
'of his peace, to the great terror, and disturbance, of
'many of his liege people, and subjects, to the ill ex-
'ample of all others in the like case offenders, and
'against the peace of our said lord the king, his
'crown, and dignity.'

The prisoners pleading not guilty, it was proved, that there was a meeting at the time in the indictment mentioned, in *Gracechurch-Street*, consisting of three, or four hundred people, in the open street; that *William Pen* was speaking, or preaching, to them; but what he said, the witnesses (who were officers and soldiers sent to disperse them) could not hear.—This was the effect of the evidence; which Sir *John Howel*, the then recorder, (as I find in the print of that trial) was pleased to sum up to the Jury, in these words:

'You have heard what the indictment is; it is for
'preaching to the people in the street, and drawing a
'tumultuous company after them, and Mr. *Pen* was
'speaking. If they should not be disturbed, you see
'they will go on. There are three, or four wit-
'nesses that have proved this—that he did preach
'there, that Mr. *Mead* did allow of it. After this
'you have heard by substantial witnesses what is
'said against them: NOW WE ARE UPON THE
'MATTER OF FACT, WHICH YOU ARE TO KEEP
'TO, AND OBSERVE, AS WHAT HATH BEEN
'FULLY SWORN, AT YOUR PERIL.'

This trial began on the *Saturday*; the Jury retiring, after some considerable time spent in debate, came in, and gave this verdict,—'guilty of speaking 'in *Gracechurch-Street*.' At which the court was offended, and told them, they 'had as good say no-
'thing;' adding,—'Was it not an unlawful assem-

'bly?—you mean he was ſpeaking to a tumult of 'people there?' But the foreman ſaying, what he had delivered was all he had in commiſſion; and others of them affirming, that they allowed of no ſuch words as an 'unlawful aſſembly' in their verdict; they were ſent back again, and then brought in a verdict in writing ſubſcribed with all their hands, in theſe words: '*We*, '*the Jurors hereafter named, do find* William Pen *to be* '*guilty of ſpeaking, or preaching, to an aſſembly met to-*'*gether in* Gracechurch-Street, *the* 14*th of* Aug. 1670. '*And* William Mead *not guilty of the ſaid indictment.*'

* This the court reſented ſtill worſe, and therefore ſent them back again, and adjourned till *Sunday* morning; but then too they inſiſted on the ſame verdict: ſo the court adjourned till *Monday* morning; and then the Jury brought in the priſoners generally 'not 'guilty;' which was recorded, and allowed of. But immediately the court fined them forty marks a man, and to lie in priſon till paid.

Being thus in cuſtody, *Edw. Buſhel*, one of the ſaid Jurors, on the ninth of *November* following, brought his *Habeas Corpus* in the court of *Common-Pleas*. On which the ſheriffs of *London* made return, 'That he 'was detained by virtue of an order of ſeſſions, where-'by a fine of forty marks was ſet upon him, and eleven 'others, particularly named; and every of them being 'Jurors ſworn to try the iſſues joined between the 'king, and *Pen*, and *Mead*, for certain treſpaſſes, 'contempts,

* *Note*, Though this Jury, for their excellent example of courage, and conſtancy, deſerve the commendation of every good *Engliſhman*; yet, if they had been better adviſed, they might have brought the priſoners in not guilty at firſt, and ſaved themſelves the trouble, and inconveniencies of theſe two nights reſtraint. See *State-Trials*, vol. II. p. 606, in fol. Vide note * to page 16.

'contempts, unlawful aſſemblies, and tumults, and 'who then, and there, did acquit the ſaid *Penn*, and '*Mead*, of the ſame, againſt the law of this kingdom, 'and againſt full, and manifeſt, evidence, and againſt 'the direction of the court in matter of law, of, and 'upon the premiſes openly in court to them given, 'and declared; and that it was ordered they ſhould 'be impriſoned till they ſeverally paid the ſaid fine, 'which the ſaid *Buſhel* not having done, the ſame was 'the cauſe of his caption and detention *.'

The court coming to debate the validity of this return, adjudged the ſame inſufficient: For, 1. The words,—'againſt full, and manifeſt, evidence,' was too general a clauſe: the evidence ſhould have been fully, and particularly, *recited*; elſe how ſhall the court know it was ſo full and evident? they have now only the judgment of the ſeſſions for it, that it was ſo: but ſaid the Judges, 'our judgments ought to be 'grounded upon our own inferences, and under-'ſtandings, and not upon theirs.'

2. It is not ſaid, that they acquitted the perſons indicted againſt full and manifeſt evidence, *corruptly*, and *knowing* the ſaid evidence to be *full* and *manifeſt*. For otherwiſe it can be no crime; for that may ſeem full, and manifeſt, to the court, which does not appear ſo to the Jury.

3. The other part of the return, *viz.* That 'the 'Jury had acquitted thoſe indicted, againſt the direc-'tion of the court in matter of law,' was alſo adjudged to be nought, and unreaſonable; and the fining the Juries for giving their verdict in any caſe concluded to be illegal, for the ſeveral reaſons before recited, and other authorities of law urged to that

* See *Buſhel*'s Caſe in *Vaughan*'s Reports at large.

purpoſe; and all the precedents, and allegations, brought to juſtify the fine, and commitment, ſolidly anſwered. Whereupon the chief juſtice delivered the opinion of the court, 'That *the cauſe of commitment* 'was *inſufficient*;' and accordingly the ſaid *Buſhel*, and other his fellow-priſoners, were diſcharged, and left to the common law for remedy and reparation of the damages, by that tortuous, illegal impriſonment, ſuſtained.

Which caſe is (amongſt others) reported by that learned judge Sir *John Vaughan*, at that time lord chief juſtice of the *Common-Pleas*; ſetting forth all the arguments, reaſons, and authorities, on which the court proceeded therein: from which I have extracted moſt of the reaſons which I before recited for this point, and, for the greateſt part, in the very words of that reverend author.

Jurym. This reſolution hath, one would think, (as you ſaid) knocked this illegal practice on the head, beyond any poſſibility of revival; but may it not one day be denied to be law, and the contrary juſtified?

Barr. No ſuch thing can be done without apparently violating, and ſubverting, all law, juſtice, and modeſty: for though the *precedent* itſelf be valuable, and without further enquiry is wont to be allowed, when given thus deliberately upon ſolemn debate by the whole court; yet, it is not only that, but the ſound, ſubſtantial, and everlaſting *reaſons*, whereon they grounded ſuch their reſolves, that will, at all times, juſtify fining of Juries in ſuch caſes to be illegal. Beſides, as the reporter was moſt conſiderable, both in his quality as lord chief juſtice, and for his parts, ſoundneſs of judgment, and deep learning in the law; ſo ſuch his book of Reports is approved, and recommended

mended to the world, (as appears by the page next after the epiſtle) by the right honourable the preſent lord chancellor of *England*; Sir *William Scroggs*, now lord chief juſtice of *England*; my lord *North*, chief juſtice of the *Common-Pleas*; and, in a word, by all the judges of *England* at the time of publiſhing thereof: ſo that it cannot be imagined how any book can challenge greater authority, unleſs we ſhould expect it to be particularly confirmed by act of parliament.

Jurym. You have anſwered all my ſcruples: and ſince I ſee the law has made ſo good proviſion for Jurymen's privileges, and ſafety; God forbid any Juryman ſhould be of ſo baſe a temper, as to betray that, otherwiſe, impregnable fortreſs, wherein the law hath placed him to preſerve, and defend, the juſt rights, and liberties of his country, by treacherouſly ſurrendering the ſame into the hands of violence, or oppreſſion, though maſked under ever ſo fair ſtratagems, and pretences. For my own part, I ſhall not now decline to appear according to my ſummons; and therefore (though I fear I have detained you too long already) ſhall deſire a little more of your direction about the office of a Juryman in particular, that I may uprightly, and honeſtly, diſcharge the ſame.

Barr. Though I think, from what we have diſcourſed, being digeſted, and improved, by your own reaſon, you may ſufficiently inform yourſelf; yet, to gratify your requeſt, I ſhall add a few brief remarks, as well of what you ought cautiouſly to avoid, as what you muſt diligently purſue, and regard, if you would juſtly, and truly, do your duty.

Firſt, As to what you muſt avoid.

1. I am very confident, that you would not willingly violate the oath which you take: but it is poſ-

ſible

ſible that there are ſuch, who as frequently break them as take them, through their *careleſs cuſtom* on the one hand, or *ſlaviſh fear* on the other; againſt whom I would fully caution you; that you may defend yourſelf, and others, againſt any enemies of your country's liberties, and happineſs, and keep a good conſcience towards God, and towards man.

2. It is frequent, that when Juries are withdrawn, that they may conſult of their verdict, they ſoon forget that ſolemn oath they took, and that mighty charge of the life and liberty of men, and their eſtates, whereof then they are made judges; and that, on their breath, not only the fortunes of the particular party, but perhaps the preſervation, or ruin, of ſeveral numerous families does ſolely depend: Now I ſay, without due conſideration of all this; nay ſometimes without one ſerious thought, or conſulted reaſon, offered *pro* or *con*, preſently the foreman, or one, or two, that call themſelves antient Jurymen, (though in truth they never knew what belongs to the place more than a common ſchool-boy,) rathly deliver their opinions; and all the reſt, in reſpect to their ſuppoſed gravity, and experience, or becauſe they have the biggeſt eſtates, or to avoid the trouble of diſputing the point, or to prevent the ſpoiling of dinner by delay, or ſome ſuch weighty reaſon, forthwith agree blindfold, or elſe go to holding up of hands, or telling of noſes, and ſo the major vote carries away captive both the reaſon, and the conſcience, of the reſt: thus trifling with ſacred oaths, and putting men's lives, liberties, and properties (as it were) to the hap-hazard of croſs or pile. This practice, or ſomething of the like kind, is ſaid to be too cuſtomary amongſt ſome Jurors, which occaſions ſuch their extraordinary diſpatch of the weightieſt, or moſt

moſt intricate, matters; but there will come a time when they ſhall be called to a ſevere account for their haſte, and negligence; therefore have a care of ſuch fellow-jurors.

3. Such a ſlaviſh fear attends many Jurors, that let but the court direct to find guilty, or not guilty, though they themſelves ſee no juſt reaſon for it; yea, oft-times though their own opinions are contrary, and their conſciences tell them it ought to go otherwiſe; yet, right, or wrong, accordingly they will bring in their verdict; and, therefore, many of them never regard ſeriouſly the courſe, and force, of the evidence; what, and how, it was delivered, more, or leſs, to prove the indictment; *&c.* but as the court ſums it up, they find: as if Juries were appointed for no other purpoſe but to echo back, what the bench would have done. Such a baſe temper is to be avoided, as you would eſcape being forſworn, even though your verdict ſhould be right: for ſince you do not know it ſo to be, by your own judgment, or underſtanding, you have abuſed your oath, and hazarded your own ſoul, as well as your neighbour's life, liberty, or property; becauſe you blindly depend on the opinion, or perhaps paſſion of others, when you were ſworn well, and truly, to try them yourſelves. Such an implicit faith is near of kin to that of *Rome* in religion, and, at leaſt, in the next degree, as dangerous *.

4. There

* Though Judges are likely to be more *able* than Jurymen, yet Jurymen are likely to be more *honeſt* than Judges; eſpecially in all caſes where the power of the prerogative, or the rights of the people, are in diſpute. Our rights, therefore, both as individuals, and as a people, are more

4. There are ſome that make a trade of being Jurymen; that ſeek for the office; uſe means to be conſtantly continued in it; will not give a diſobliging verdict, leſt they ſhould be diſcharged, and ſerve no more: theſe ſtanding Jurors have certainly ſome ill game to play. There are others that hope to ſignalize themſelves, to get a better trade, or ſome preferment by ſerving a turn. There are others that have particular piques, and a humour of revenge againſt ſuch, or ſuch, parties: if a man be but miſcalled by ſome odious name, or ſaid to be of an exploded faction—ſtraight they cry, hang him, find him guilty, no puniſhment can be too bad for ſuch a fellow; in ſuch a caſe they think it merit to ſtretch an evidence on the tenter-hooks, and ſtrain a point of law, becauſe they fancy it makes for the intereſt of the government; as if injuſtice or oppreſſion could in any caſe be for the true intereſt of government, when in truth nothing more weakens or deſtroys it. But this was an old ſtratagem, 'if thou ſuffer this man to eſcape, thou ſhalt not be '*Cæſar*'s friend:' when *Cæſar* was ſo far from either needing, or thanking them for, any ſuch baſe ſervices, that, had he but truly underſtood them, he would ſeverely have puniſhed their partiality and tyranny.

All theſe, and the like, peſtilent biaſſes, are to be avoided, and abominated, by every honeſt Juryman.

But

more likely to be ſecure, while Juries follow the reſult of their own opinion; for leſs danger will ariſe from the miſtakes of Jurymen, than from the corruption of Judges. Beſides, improper verdicts will but ſeldom occur; ſince Juries will avail themſelves of the abilities, and learning, of the Judges, by conſulting them upon all points of law; and thus to the advantage of information, may add their own impartiality.

But now as to the positive qualifications requisite.

1. You that are Jurymen, should, first of all, seriously regard the weight, and importance, of the office; your own souls, other men's lives, liberties, estates, all that in this world are dear to them, are at stake, and in your hands; therefore, consider things well before-hand, and come substantially furnished, and provided, with sound, and well-grounded, consciences,—with clear minds, free from malice, fear, hope, or favour; lest, instead of judging others, thou shouldest work thy own condemnation and stand in the sight of God, the Creator, and Judge of all men, no better than a Murtherer, or perjured Malefactor.

2. Observe well the record, indictment, or information that is read, and the several parts thereof, both as to the matter, manner, and form.

3. Take due notice of, and pay regard to, the *evidence* offered for proof of the indictment, and each part of it, as well to manner, and form, as matter: and if you suspect any subornation, foul practice, or tampering hath been with the witnesses, or that they have any malice, or sinister design; have a special regard to the circumstances, or incoherences, of their tales, and endeavour, by apt questions, to sift out the truth, or discover the villainy. And, for your better satisfaction, endeavour to write down the evidence, or the heads thereof, that you may, the better, recall it to memory.

4. Take notice of the nature of the crime charged, and what law the prosecution is grounded upon, and distinguish the supposed criminal fact, which is proved, from the aggravating circumstances, which are not proved.

5. Remember that in Juries there is no plurality of voices to be allowed: seven cannot over-rule, or, by

virtue

virtue of majority, conclude five; no, nor eleven one. But as the verdict is given in the name of all the twelve, or else it is void; so every one of them must be actually agreeing, and satisfied in his particular understanding, and conscience, of the truth, and righteousness, of such verdict, or else he is forsworn. And, therefore, if one man differ in opinion from his fellows, they must be kept together; till either they, by strength of reason, or argument, can satisfy him, or he convince them. For he is not to be hectored, much less punished, by the court into a compliance: for as the lord chief justice *Vaughan* says well *, 'if a man differ in judgment from his fellows, 'whereby they are kept a day, and a night, though 'his dissent may not in truth be so reasonable as 'the opinion of the rest that agree; yet, if his judg-'ment be not satisfied, one disagreeing, can be no 'more criminal, than four, or five, disagreeing with 'the rest.' Upon which occasion the said author recites a remarkable case out of an antient † law-book: 'A Juror would not agree with his fellows for two 'days, and being demanded by the judges, if he would 'agree, said he would first die in prison; whereupon 'he was committed, and the verdict taken: but 'upon better advice, the verdict of the eleven was 'quashed, and the Juror discharged without fine; 'and the Justices said "the way was to carry them in "carts" (this is to be understood at assizes, where the Judges cannot stay, but must remove in such a time into another county) "until they agreed, and NOT "BY FINING THEM." And as the Judges erred in 'taking the verdict of eleven, so they did in impri-'soning

* Rep. *fol.* 151. † 41 *Ass. p.* 11.

'ſoning the twelfth.' And therefore, you ſee, on ſecond thoughts releaſed him.

6. Endeavour, as much as your circumſtances will permit, at your ſpare hours to read, and underſtand, the fundamental laws of the country; ſuch as *Magna Charta*, the Petition of Right, the late excellent act for *Habeas Corpus's*, *Horne's Mirror of Juſtices*, Sir *Edw. Coke*, in his 2d, 3d, and 4th Parts of the Inſtitutes of the Law of *England*, and Judge *Vaughan*'s Reports. Theſe are books frequent to be had, and of excellent uſe to inform any reader, of competent apprehenſion, of the true liberties, and privileges, which every *Engliſhman* is juſtly intitled unto, and eſtated in, by his birthright; as alſo the nature of crimes, and the puniſhments ſeverally, and reſpectively, inflicted on them by law; the office, and duties, of Judges, Juries, and all officers, and miniſters, of juſtice, *&c.* which are highly neceſſary for every Juryman, in ſome competent meaſure, to know: for the law of *England* hath not placed trials by Juries, to ſtand between men, and death or deſtruction, to ſo little purpoſe, as to pronounce men guilty, without regard to the nature of the offence, or to what is to be inflicted thereupon.

For want of duly underſtanding, and conſidering, theſe things, Juries, many times, plunge themſelves into lamentable perplexities; as it befel the Jury who were the triers of Mr. *Udal*, a miniſter, who in the 32d year of queen *Eliz.* was indicted, and arraigned, at *Croydon* in *Surry**, for high-treaſon, for defaming the queen, and her government, in a certain book, intitled, 'A Demonſtration of the Diſcipline, &c.' And though there was no direct, but a ſcambling ſhadow of

 proof;

* See *State-Trials*, fol. vol. I. p. 161.

proof; and though the book, duly conſidered, contained no matter of treaſon, but certain words which by a forced conſtruction were laid to tend to the defamation of the government, and ſo the thing [was] proſecuted under that name; yet the Jury not thinking that in pronouncing him guilty, they had upon their oath pronounced him guilty of treaſon, and to die as a traitor; but ſuppoſing that they had only declared him guilty of making the book; hereupon they brought him in guilty: but when, after the Judge's ſentence of death againſt him, which they never in the leaſt intended, they found what they had done; they were confounded in themſelves, and would have done any thing in the world to have revoked that unwary pernicious verdict, when, alas! it was too late. Dr. *Fuller* has this witty note on this gentleman's conviction, 'that it was conceived *rigorous* in the *greateſt*, 'which at beſt' (ſaith he) 'is *cruel* in the *leaſt* degree.' And it ſeems ſo queen *Elizabeth* thought it, for ſhe ſuſpended execution, and he died naturally. But his ſtory ſurvives, to warn all ſucceeding Jurymen to endeavour better to underſtand what it is they do, and what the conſequences thereof will be.

7. As there is nothing I have ſaid intended to encourage you to partiality, or tempt any Juryman to a connivance at ſin, and malefactors, whereby thoſe peſts of ſociety ſhould avoid being brought to condign puniſhment, and ſo the law ceaſe to be a terror to evil-doers, which were in him an horrible perjury, and indeed a fooliſh pity, or *crudelis miſericordia*, a cruel mercy; (for *he* is highly injurious to the good, that abſolves the bad, when real crimes are proved againſt them:) ſo I muſt take leave to ſay, that in caſes where the

the matter is dubious, both lawyers, and divines, prescribe rather favour, than rigour. An eminent and learned Judge * of our own, has in this advice and wish gone before me: *Mallem reverà viginti facinorosos mortem pietate evadere, quàm justum unum injustè condemnari.* 'I verily' (saith he) 'had rather twenty 'evil-doers should escape death through tenderness, 'or pity, than that one innocent man should be 'unjustly condemned.'

I shall conclude with that excellent advice of my lord *Coke* †, which he generally addresses to all Judges, but may no less properly be applied to Jurors:——

Fear not to do right to all, and to deliver your verdicts justly according to the laws; for fear is nothing but a betraying of the succours that reason should afford: and if you shall sincerely execute justice, be assured of three things:

1. Though some may malign you, yet God will give you his blessing.

2. That though thereby you may offend great men, and favourites, yet you shall have the favourable kindness of the Almighty, and be his favourites.

And lastly, That in so doing, against all scandalous complaints, and pragmatical devices, against you, God will defend you as with a shield.——'For 'thou, Lord, wilt give a blessing unto the righte-'ous, and with thy favourable kindness wilt thou 'defend him as with a shield.' *Psalm* v. 15.

* *Fortescue*, cap. 27.

† In the Epilogue of his 4th Part of *Institutes*.

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